Mid-States Construction, Inc. *and* United Brotherhood of Carpenters and Joiners of America, Local Union No. 565, a/w United Brotherhood of Carpenters and Joiners of America. Cases 25-CA-14678 and 25-CA-14924

23 May 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 25 April 1983 Administrative Law Judge James J. O'Meara issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The primary issue in this case is whether the Respondent was bound to a collective-bargaining agreement with the Union by assent to, or ratification and/or adoption of, that agreement. Unless the Respondent is bound by the contract, its refusal to comply with its provisions would not constitute an unfair labor practice. While the judge found that the Respondent was bound to the contract, we reverse that conclusion for the reasons set out below and accordingly we dismiss the complaint.

The facts, which are more fully stated in the judge's decision, reveal that the Respondent was incorporated in 1975, and is engaged in the construction of steel frame buildings. The Respondent's work includes excavating, the pouring of foundations and concrete slabs, and the building of offices. In the course of its business the Respondent has employed carpenters, laborers, cement finishers, ironworkers, and operating engineers. It is undisputed that the Respondent has never formally signed a collective-bargaining agreement with any union, including the Charging Party Union. Although the Union has been a party to a collective-bargaining agreement with an association of employers named the General Building Contractors Council of Elkhart, Indiana (the Association), the Respondent has never been a member of the Association. It has been the practice of the Association's members to sign memoranda of agreement stating that the members would abide by the negotiated contract. Additionally, after contracts have been negotiated, the Union has sent memoranda of agreement to every contractor who employs union members. The Respondent has received, but has constantly refused to sign, these memoranda.

When the Respondent commenced operations in 1975, one of its representatives contacted union business representative Hand for referral of workers. At that time Hand asked the Respondent to sign an area contract. The Respondent indicated that it would not sign such a contract, but would conduct transactions with the Union in the same manner a prior employer had.[1] The Respondent stated that it would sign an "Assent of Participation with the Indiana State Council of Carpenters' Health and Welfare Fund Agreement"[2] and that it

[1] This prior employer was McCollough Construction. The General Counsel does not contend that the Respondent is a successor employer to McCollough. The evidence indicates that, in fact, the Respondent conducted its business with the Union as McCollough had.

[2] The assent agreement was as follows:

INDIANA STATE COUNCIL OF CARPENTERS' HEALTH AND WELFARE FUND

ASSENT OF PARTICIPATION AGREEMENT

Fund No.

The undersigned Employer employing members of Local Unions, District Councils and other eligible employees, for and in consideration of the provision by the above Health and Welfare Plan (hereinafter simply called "Welfare Plan") of health, welfare, and death benefits, hereby agrees to accept, to be bound by, and to comply with the terms and provisions of the Collective Bargaining Agreement of Local 565 Council stipulating these benefits and the Agreement and Declaration of Trust establishing the Welfare Plan as amended and as hereafter amended from time to time.

Receipt of a copy of this Trust Agreement as amended to date is here acknowledged.

The Employer hereby accepts as his/its representatives, the present Employer Trustees of the Welfare Plan and their successors in office from time to time.

It is intended that this Assent of Participation be part of the Trust Agreement and be the written agreement required by the Labor Management Act of 1947 (302) (5)(B) to permit the Welfare Plan to receive contributions from the Employer on behalf of his/its employees.

A monthly report of hours worked, and remittance, must be mailed to the Fund on or before the 10th day following the close of the month covered by the report. Seven days after that date, a late charge of 10% of the total Health and Welfare remittance or $10.00, whichever is greater, is due for each 30 days or portion thereof and must be paid with the late contribution.

Contributions to the Welfare Plan will be made by this Employer as required by this and by said Agreements and Declaration of Trust, as amended and as hereafter amended from time to time, at the rates and in the manner prescribed either (a) therein or (b) in a collective bargaining agreement entered into by this Employer or entered into by an Association of which he/it is a member or the terms of which he/it observes, with any local union or District Council affiliated with the Indiana State Council of Carpenters and the Indiana State Council of Carpenters Health and Welfare Fund itself, as any or all of such agreements are or may be amended, supplemented, modified, extended, renewed or superseded from time to time.

Such contributions shall commence forthwith, if they have not already commenced, and shall continue for a period provided in this and in such agreements, including all amendments, supplements, modifications, extensions, renewals, or successor agreements, thereto, and shall continue thereafter until ninety days after the Board of Trustees of the Welfare Plan shall have received from this Employer written notice of termination of this Assent of Participation or until

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would pay union-scale wages, but that it would not sign the collective-bargaining agreement. Thereafter, the Respondent paid appropriate wage scales and remitted health and welfare benefits payments for union members who worked for it. Sometime after 1975, the Association-Union collective-bargaining agreement included a provision for dues checkoff and remittance. When that provision was enacted, the Respondent also made such deductions and remittance for its employees who were union members.

Although the Union frequently requested the Respondent to become a signatory to the contract, the Respondent steadfastly refused that request. Furthermore, while adhering to some contractual conditions as indicated above, the Respondent did not comply with, or attempt to follow, many of the terms of the collective-bargaining agreement, even while union members were employed. The Respondent did not maintain a union shop, and did not discharge employees for their failure to join the Union. The Respondent did not provide any tools to employees. Contractual overtime payments, "showup time" payments, and travel pay were never made by the Respondent. The contract required that an employer grant employees two 10-minute coffee breaks; the Respondent gave its employees only one 10-minute break. Further, the Respondent paid union wages and fringe benefits only for union members; nonunion carpenters were paid 25 percent below union scale, and did not receive any fringe benefits.[3] As indicated above, the Respondent's conduct was allegedly patterned on the prior employer's procedures. Also as previously noted, the Respondent repeatedly rejected the Union's request to sign a contract.

In early 1982, in response to economic conditions, the Respondent reduced the wages of its owners. In June 1982, the Respondent informed its employees at a meeting that, because of its fiscal condition, the Respondent was reducing employee wages and discontinuing payments for fringe benefits on behalf of union employees. Subsequently, the Respondent told the Union of its actions. No bargaining took place between the parties. Thereafter, in September 1982, the Union sent a letter to the Respondent requesting information concerning the Respondent's relationship with another company, LeMaster Steel Erectors, Inc.[4] The Union based its request on its contention that the Respondent "is, or may be, in violation of the collective-bargaining agreement with this Union." The Respondent did not provide the requested information.

The General Counsel contends that the nature of the relationship between the Respondent and the Union from June 1975 until June 1982 imposed a contractual obligation on the Respondent to negotiate with the Union and to refrain from unilateral acts. The General Counsel points to the assent agreement between the parties and to the Respondent's compliance with contractual terms, including, inter alia, its conduct in remitting various fund payments and dues checkoff to the appropriate entities. The judge found, in agreement with the General Counsel, that the provisions of the assent agreement bound the Respondent to the collective-bargaining agreement. The judge noted particularly that, subsequent to signing the assent agreement, the Respondent fulfilled collective-bargaining obligations by making fund payments and dues checkoff, and by following the contract in other respects. Since the Respondent never revoked the assent agreement, the judge concluded that it was still bound by the collective-bargaining agreement. In this respect, the judge found that this case was governed by *Arco Electric Co.*, 237 NLRB 708 (1978), enfd. 618 F.2d 698 (10th Cir. 1980). Accordingly, the judge found that the Respondent's unilateral changes with respect to wages, fund payments, and dues-checkoff provisions violated Section 8(a)(5) of the Act. Similarly, the judge concluded that the Respondent failed in its statutory duty to bargain by refusing to provide information requested by the Union. As indicated, we cannot agree with that conclusion.

In finding that the assent agreement bound the Respondent to the entire collective-bargaining agreement, the judge focused solely on the first paragraph in the agreement, which states, inter alia, that the signing employer "agrees to accept, to be bound by, and to comply with the terms and provisions of the Collective Bargaining Agreement of [the Union] stipulating these benefits." Based on the quoted language, the judge determined the Respondent was a party to a collective-bargaining agreement with the Union until written notice canceling the agreement was made under the terms of the assent agreement. In our opinion, however, this analysis is infirm in several respects.

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the collective bargaining agreement is nullified between the Employer and the Union.

Any dispute as to the amount to be contributed under this agreement shall be settled by an impartial arbitrator selected unanimously by the parties hereto, but if they fail to agree upon an arbitrator within a reasonable length of time, then any party hereto may petition the United States District Court for the Indianapolis, Division of the Southern District of Indiana for the appointment of such impartial arbitrator.

[3] The judge's decision contains a more detailed list of the Respondent's failure to follow the contract.

[4] The full text of the letter is set forth in the judge's opinion.

The assent agreement defines, by its terms, the intent of the agreement:

> It is intended that this Assent of Participation be part of the Trust Agreement and be the written agreement required by the Labor Management Act of 1947 (302) (5)(B) to permit the Welfare Plan to receive contributions from the Employer on behalf of his/its employees.

Further, the statement relied on by the judge is not as unambiguous as it purports to be, since the acceptance language is modified by the phrase "stipulating these [i.e., health, welfare, and death] benefits." Thus, the modification indicates that the Respondent is bound to the contract only inasfar as it states what benefits it is responsible for. In addition, another paragraph reads as follows:

> Contributions to the Welfare Plan will be made by this Employer as required by this and by said Agreements and Declaration of Trust, as amended and as hereafter amended from time to time, at the rates and in the manner *prescribed either* (a) *therein or* (b) *in a collective bargaining agreement* entered into by this Employer. . . . [Emphasis added.]

As indicated by the italicized words, contributions to the welfare plan could be made pursuant to the assent and trust agreement, *or* a collective-bargaining agreement.[5] Thus, contrary to the judge, we do not find that the assent agreement is an unambiguous document binding the Respondent to a collective-bargaining agreement with the Union. We agree with the Respondent that the document is what it states it is, and what the parties testified they understood it to mean: it is a document permitting the Respondent to contribute to a health and welfare fund.[6]

The judge and the General Counsel further emphasize that the Respondent's conduct supports the theory that the Respondent adopted and bound itself to the collective-bargaining agreement. In our opinion, however, the facts do not support such a contention.

As detailed above, the Respondent consistently and overtly breached the terms of the contract to which it allegedly was a party. It is true that the Respondent complied with the terms of the contract with respect to actual wages, health and welfare payments and, when relevant, dues checkoff. However, it did so only for union members. More pervasive was the Respondent's open repudiation of substantive contractual terms, including those concerning overtime pay, travel and showup pay, union security, scope of work, and use of nonunion subcontractors. The judge excused the Union's failure to attempt to enforce these and other provisions as "an option available to the Union as a party to the Agreement." Both the judge and the General Counsel concentrate on those terms and conditions of employment followed by the Respondent. Yet, as noted, only union members, but not other employees including nonunion carpenters, were accorded even these limited contractual benefits. And, unlike the judge and the General Counsel, we do not agree that the Respondent, by its conduct, bound itself to the contract. The facts recited above reveal, to the contrary, that the Respondent, from the inception of its relationship with the Union, continuously indicated and acted as a party *not* bound or restricted to a collective-bargaining agreement.[7]

In sum, given the fact that it was not a party to the contract, the Respondent cannot be found to have refused to bargain in violation of the Act by its unilateral changes in terms and conditions of employment. Nor does its refusal to provide the requested information constitute a violation, since the Union's request was premised on a contractual relationship and breach thereof, which we have concluded did not exist. Accordingly, we shall dismiss the complaint.

[5] We also note, in passing, that the assent agreement appears to be between the Respondent and the trustees of the health and welfare fund. Although signed by the Union's business representative, the contract lists the "Employer" and the "Board of Trustees" as the signatory parties.

[6] The judge considered the Union's repeated attempts to secure the Respondent's signature on a memorandum agreement (which was designed so as to specifically bind non-Association members to the contract) as nonprobative on the issue of the meaning of the assent agreement. The judge reasoned that the expiration date of the contract differed from the 90-day notice provision of the assent agreement, and thus the Union's effort to obtain greater security by direct obligation under the contract without an escape provision explained its continued efforts. While the judge's explanation may be accurate insofar as it goes, it still does not aid us in interpreting the assent agreement. Moreover, the Union's conduct underscores the fact that the Respondent was never a *direct* signatory to a collective-bargaining agreement.

[7] *Arco Electric*, supra, relied on by the judge and the General Counsel, is distinguishable from the instant case. In *Arco*, the employer signed a "letter of assent B," which was a short-form agreement stating that the employer agreed to be bound by a contract between the National Electrical Contractors Association (NECA) and a local of the International Brotherhood of Electrical Workers (IBEW). The Board found both that the "letter of assent B" bound the employer to the contract, and that the employer's course of conduct estopped it from repudiating the contract. The court of appeals was not wholly persuaded that the assent letter continuously bound the employer to the contract, but it accepted the Board's alternative theory that the employer considered itself, and was in fact, bound to the contract by its course of conduct. In the instant case, the assent agreement, contrary to that in *Arco*, is not a simple document whose sole purpose relates to binding a party to a contract. Rather, the assent agreement is a complex document concerning a health and welfare trust. As noted by the Respondent, the memorandum of agreement the Union consistently attempted to have the Respondent sign, and which the Respondent consistently refused to sign, more closely resembles the "letter of assent B" which was the subject of *Arco*. Further, the Respondent's conduct here is in sharp contrast to that of the employer in *Arco*: the Respondent did not act like a party bound by the contract, and told the Union on numerous occasions it would not be a party to a contract.

ORDER

The complaint is dismissed.

DECISION

STATEMENT OF THE CASE

JAMES J. O'MEARA, Administrative Law Judge. The complaint in Case 25-CA-14678 was issued on August 27, 1982, and is based on a charge filed on July 14, 1982, by the United Brotherhood of Carpenters & Joiners of America, Local Union No. 565, affiliated with United Brotherhood of Carpenters & Joiners of America (the Union). That complaint alleges that the Respondent discharged, or constructively discharged, two employees because they refused to accept wages lower than those provided for in a certain collective-bargaining agreement entered into between the Union and the General Building Contractors Council of Elkhart, Indiana. It further alleges that since June 1975 the Union has been designated as the exclusive collective-bargaining representative of the Respondent's employees comprising an appropriate unit and since that date the Union has been recognized as such representative by the Respondent throughout successive collective-bargaining agreements from 1975 to the present time. It is further alleged that since about February 14, 1982, and particularly on July 11, 1982, the Union requested the Respondent to recognize it as the exclusive collective-bargaining representative of the Respondent's employees with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and that since June 28, 1982, the Respondent has refused to comply with the provisions of the collective-bargaining agreements by changing working conditions, failing to pay contractual wage rates, and fringe benefits required under the terms of the collective-bargaining agreement and further failing and refusing to require membership in the Union as a condition of continued employment.

The complaint in Case 25-CA-14924 was issued on June 25, 1982, and is based on a charge filed by the Union on October 7, 1982. This complaint charges that since June 1975 the Union has been the designated exclusive collective-bargaining representative of the Respondent's employees in an appropriate unit and since that date the Union has been recognized as such representative by the Respondent continuing to the present time and that as a result of such capacity the Union has requested the Respondent to furnish certain information necessary to the conduct by the Union of its representation of the Respondent's employees, which the Respondent has failed to provide and that such conduct comprises unfair labor practices within the meaning of Section 8(a)(1) and (5) and Section 8(d) of the Act.

A hearing was held in Elkhart, Indiana, on October 4, 1982, and November 8 and 9, 1982. At that hearing a motion made by the General Counsel to consolidate the above-described complaints for hearing was made and granted. At the close of the hearing, after all of the evidence had been presented, a motion was made by the Respondent to strike that portion of the complaint in Case 25-CA-14678 wherein it is alleged that two employees of the Respondent were discharged because of their refusal to accept wages and benefits less than those provided by the collective-bargaining agreement. The motion was not objected to by the General Counsel and was granted. Accordingly, the hearing proceeded on the issue of whether or not the Respondent ratified and adopted the collective-bargaining agreements in effect from July 1975 to the present and thus was bound thereby and whether or not the acts of the Respondent in refusing to comply with the provisions thereof and to submit certain information as requested by the Union constitutes a violation of the Act.

The pleadings establish that it is appropriate for the Board to assert jurisdiction, and that the Charging Party is a "labor organization" as defined by Section 2(5) of the Act.

In making the following findings of fact and conclusions, I have considered the entire record in this proceeding, my observation of the demeanor of the witnesses, and the briefs filed by counsel for the parties.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. PREFATORY FACTS

The Respondent, Mid-States Construction, Inc., is a general contractor primarily engaged in the construction of steel frame buildings. This work includes excavating, pouring of foundation and concrete slabs, and building of office space in conjunction with the building of steel commercial and industrial buildings. It is the practice of the Respondent, in the course of its construction projects, to subcontract plumbing, electrical, heating, and steel erection, and at times excavation and carpentry.

The Respondent was incorporated by one Robert LeMaster who was the initial president and sole shareholder. Mid-States currently has three shareholders, namely, Keith McCollough, Lloyd McCollough, and Don Shaum. Lloyd McCollough has been employed by Mid-States in various capacities since May 1975. In May 1978 Keith McCollough commenced working at Mid-States, and in July 1979 purchased a one-third shareholder interest in Mid-States and then became president. Don Shaum, a union carpenter, who had worked in the field as Mid-States foreman since 1975 subsequently purchased a one-third interest in Mid-States. The Respondent commenced its operations approximately the middle of July 1975. Prior to the organization of the Respondent, a company known as McCollough Construction Company conducted the same basic operations and many of the principles of the Respondent were so engaged.

Although Mid-States employs union carpenters, laborers, cement finishers, iron workers, and operating engineers it is not, nor has it ever been, a signatory to a collective-bargaining agreement with any union.

II. THE COLLECTIVE-BARGAINING AGREEMENT

From prior to May 1975 to the present date the Union has been a party to a collective-bargaining agreement with the General Building Contractors of Elkhart, Indiana. That contract provides for the representation of the employees within a unit comprising employees engaged

in the mailing, fashioning, joining, assembling, erecting, fastening, or dismantling of all materials of wood, plastic, metal, fiver, cork, and composition and other substitute materials.[1] The Respondent is not now, nor has it ever been, a member of the General Building Contractors of Elkhart, Indiana. It has been the practice for members of the Association to execute a memorandum of agreement stating that they will abide by and be bound by the collective-bargaining agreement executed by the Association. After each collective-bargaining agreement has been executed by the Association and the Union, it has been the practice of the Union to send a memorandum of agreement to every contractor who employs members of Local 565. Mid-States has received, and consistently refused to sign, such memorandum of agreement.

III. THE RELATIONSHIP OF THE RESPONDENT AND THE UNION

About the time that the Respondent commenced operations as Mid-States Construction, Inc., Jack McCollough of the Respondent contacted union representative Noble Hand and requested that Hand send some journeymen carpenters to the Respondent's job. Hand asked the Respondent if he would become a signatory to the area contract. McCollough replied that they would not but would handle the relationship the same way that McCollough Construction had conducted its business with the Union. McCollough stated that the Respondent will sign an "Assent of Participation Agreement" and pay the wages but they would not sign the contract. Accordingly, and thereafter on June 30, 1975, the Respondent entered into a written assent of participation agreement with the Indiana State Counsel of Carpenters Health and Welfare Fund. This agreement provides, in part, as follows:

> The undersigned employer employing members of Local Unions, District Counsels and other eligible employees, for and in consideration of, the provision by the above Health and Welfare Plan (hereinafter called "Welfare Plan") of health, welfare and death benefits, *hereby agrees to accept, to be bound by*, and to comply with the terms and provisions of the *Collective Bargaining Agreement of Local 565 Counsel stipulating these benefits* and the Agreement and Declaration of Trust establishing the Welfare Plan as amended and hereafter amended from time to time. [Emphasis added.]
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> . . . .
>
> It is intended that this Assent of Participation be part of the Trust Agreement and be the written agreement required by the Labor Management Act of 1957 (302) (5) (B) to permit the Welfare Plan to receive contributions from the Employer on behalf of his/its employees . . . .
>
> Contributions to the Welfare Plan will be made by this Employer as required by this and by said Agreements and Declarations of Trusts as amended and as hereafter amended, from time to time, at the rates and manner prescribed either (a) therein or (b) in a collective bargaining agreement entered into by this Employer or entered into by an Association of which he/it is a member or the terms by which he/it observes, within any Local Union or District Counsel affiliated with the Indiana State Counsel of Carpenters and the Indiana State Counsel of Carpenters Health and Welfare Fund itself, as any or all of such agreements are, or may be amended, supplemented, modified, extended, renewed or superseded from time to time.

In addition to the payment of the contract wage scale and the prescribed health and welfare benefits on behalf of the Respondent's union carpenter employees, the Respondent paid the designated benefits provided in regard to the pension and apprentice fund, and in June 1980 added to the payments for the health and welfare fund, the pension fund, and the apprentice fund, a 2-percent union dues-checkoff payment. The Respondent submitted the aforesaid described payments to the Union from May 1975 to June 1982, after which the Respondent ceased to make such payments.

IV. THE RESPONDENT'S EMPLOYEE RELATIONSHIPS AND THE COLLECTIVE-BARGAINING AGREEMENT

Throughout the time material herein, June 1975 to the present date, the Respondent, although employing several union carpenters acquired either from the union hall or independently of the union hall, did not comply with nor attempt to comply with the terms of the various collective-bargaining agreements executed from time to time between the Union and the Association.

Article III (a) of the collective-bargaining agreement requires each employer to maintain a union shop. The Respondent employs nonunion as well as union carpenters. Its practice is to engage journeymen union carpenters when the carpentry work requirements are such that high quality carpentry work is required.

Article III (c) requires the employer to discharge an employee who fails to become a member of the Union after a stipulated period of time. The Respondent has not discharged employees for failing to join the Union and has as stated before employed nonunion carpenters.

Article III (d) requires the employer to hire new employees through the union hiring hall. The Respondent employed most of its employees whether they do carpentry work or otherwise by "word of mouth," review of pending applications for employment, or from persons soliciting employment.

Article IV, section 3, requires that the employer pay overtime to his carpentry employees at a rate of 1-1/2 times the regular wage for the first 2 hours immediately after the normal 8-hour workday and then two times the regular rate of pay for work performed after the 10th hour. The Respondent paid overtime only on the basis of a 40-hour week.

Article IV, section 7, requires each employer to pay 4 hours of "showup time." The Respondent has never paid "showup time."

[1] A more detailed description not pertinent to this decision of the employees within the unit is contained in art. X, sec. 2 of the collective-bargaining agreement of 1982.

Article V, section 1, requires the employer to provide some tools. Employees of the Respondent are expected to have a full complement of handtools, enough to get the job done.

Article IV, section 5, requires the employer to pay each employee 15 cents per mile for travel outside of Elkhart County. Travel pay was never paid by the Respondent.

Article IV, section 7, requires a 10-minute coffeebreak in the morning and a 10-minute afternoon break for each employee each workday. The Respondent provides a one 10-minute coffeebreak in the morning and no other.

Article X, section 2, defines the scope of the work to be done solely by the carpenters. The Respondent's employees were requested to and did perform anything that was on the job with no relationship to what union claimed the work. The Respondent would direct its employees to do whatever was to be done and on the particular jobsite. On occasions such personnel would pour cement, dig ditches, paint, drive trucks, perform laborer work, sweep, and so on, even employees classified as carpenters would not do carpentry work exclusively but would do a little bit of everything.

Article XI, section 1, provides for a grievance and arbitration procedure in the event of any grievance arising at the end of the term of the contract.

Hand, the business agent, testified that part of his duties as a business agent was to assure that the various companies bound by the collective-bargaining agreement abided by its terms not only the wages and fringe benefits, but also all the terms and conditions of the agreement. On one occasion Hand stopped at a jobsite and inquired as to why laborers were doing carpentry work. He was advised by Shaum that this was the way Mid-States does it; because it is cheaper. Hand did not pursue the issue with the Respondent. Hand, on other occasions, came to the jobsite and observing carpenters doing cement finishing work stated, "You had better do what you can do to make a living" and "You should be glad you have a job."

Article XIII, section 3, of the contract provides that all subcontracts must be given to a contractor who has signed a contract with a union. The Respondent subcontracted carpentry work to both union and nonunion subcontractors.

Article IX, sections 1, 2, and 3 of the contract provides that the employer must pay union wages, pension benefits, and health and welfare payments. The Respondent paid the union wages and fringe benefits on behalf of union carpenters; however, nonunion carpenters were not paid union wages nor did they receive any fringe benefits. Nonunion carpenters working for the Respondent were consistently paid approximately 25 percent below the union scale. The Respondent's position is that the "understanding" between Mid-States and the Union was that if the Respondent hired union carpenters it would pay the contract wage scale, welfare and pension benefits, and withhold union dues from union carpenters.

The conduct of the Respondent from mid-1975 to June 1982 was patterned in accordance with that procedure followed by McCollough Construction Company which ceased business before Mid-States commenced its operation. Although, during the entire period in question, the Union frequently requested the Respondent to enter into an agreement to become a party to the collective-bargaining contract, the Respondent continually refused and stated that it would use union contractors and pay the rates and benefits, but not a contract.

V. TERMINATION OF THE RESPONDENT'S PAYMENTS ON BEHALF OF ITS UNION EMPLOYEES

Early in 1982 the economic conditions of the construction business generally began to have an effect on Mid-State's business. By the second quarter Mid-States had two incomplete construction jobs underway and no new contracts were scheduled. The Respondent's owners reduced their wages in an effort to reduce the overhead. In June 1982, a meeting of all the employees was called by the Respondent and they were advised that the fiscal condition of the Respondent was tenuous and that it was necessary to create a "lean" corporate and management operation by cutting overhead in order to try to "make it through these" difficult economic times. As a result of the reduction in the Respondent's overhead, it was necessary to reduce wages and to discontinue payments for fringe benefits on behalf of union employees. Prior to taking this action the Respondent did not discuss the circumstances or conditions of the Respondent with the Union nor with the various trusts to whom it had been paying fringe benefits.

The Respondent advised the Union about June 29, 1982, that it was not going to continue to pay the prevailing wage scale for union carpenters nor the fringe benefits which it had been paying. Subsequent to that date, on July 12, a union organizer met at the Respondent's offices with Keith McCollough to discuss the termination of the payment of union wage scale wages to union carpenters. McCollough advised the Union of the economic reasons requiring the termination of fringe benefit payments, that it would continue as a "non-union shop" and that the future did not look promising for resuming the relationship of the past.

VI. THE REQUEST OF THE UNION FOR INFORMATION FROM THE RESPONDENT

On September 24, 1982, the Union sent the Respondent a letter requesting certain information allegedly necessary to the Union in its capacity as representative of the Respondent's carpenters. The letter was as follows:

> September 24, 1982
>
> Mid-States Construction Co., Inc.
> 52518 County Road 9
> Elkhart, Indiana 46515
>
> Attention: Keith McCollough
>
> Dear Sir:
>
> It has come to our attention that your company is, or may be, in violation of the collective bargaining agreement with this Union: by reason of the operation of your company or its principals, of another company called LeMaster Steel Erectors, Inc., or by the performance of work which would other-

wise be performed by your company. In addition, we believe that there is a connection between your company and LeMaster Steel Erectors, Inc., either financially, through management personnel, or both. We believe that the object of LeMaster Steel Erectors, Inc., is to circumvent the provisions of our collective bargaining agreement.

The following questions are in regard to LeMaster Steel Erectors, Inc. We request that you reply within ten (10) days to these questions.

1. What positions in LeMaster Steel Erectors, Inc., are held by each Officer, Shareholder, Director or other management representative of your company?

2. State the name of each person who has a function related to labor relations for your Company and for LeMaster Steel Erectors, Inc.?

3. What customers of LeMaster Steel Erectors, Inc., are now or were referred customers of your Company?

4. What services, including clerical, administrative, bookkeeping, managerial, drafting, pattern making, detailing, sketching, or other services are performed for LeMaster Steel Erectors, Inc., by your Company?

5. What supervisory functions are performed by employees of your Company over employees of LeMaster Steel Erectors, Inc.?

6. What insurance or other benefits are shared in common by employees of your Company and the employees of LeMaster Steel Erectors, Inc.?

7. What work, if any, is being performed by your Company on LeMaster Steel Erectors, Inc., products?

Sincerely,

Stephen F. Ramsey,
State Organizer
473 U.S. Business Route #39 South
Peru, Indiana 46970
SFR/js

The Respondent has failed to provide the Union with the information requested in the above set forth letter.

VII. DISCUSSIONS AND CONCLUSIONS

The position of the General Counsel is that the Respondent, by its conduct, has obligated itself to comply with the terms of the collective-bargaining agreement between the Union and the General Building Contractors of Elkhart, Indiana. The proffered theory is couched upon the written assent of participation agreement with the board of trustees of the Indiana State Council of Carpenters Health and Welfare Fund, the remittance to the Union of health and welfare fund payments, pension fund payments, and apprentice fund payments from May 1975 to June 1982. The collective-bargaining agreement in effect from June 1, 1980, through June 1982 provided that employers subject thereto comply with a "dues checkoff provision" of 2 percent. The Respondent complied with the "dues checkoff provision" from the time of its effective date to June 1982.

The Respondent contends that the assent of participation agreement signed on June 30, 1975, was executed "in order to contribute to the Welfare and Pension Fund of the employees" and further that the subsequent conduct of the Respondent from its inception to June 1982 is not such that the Respondent can be found to have been subject to the area collective-bargaining agreement, and that the actions of the parties are such that the Union is estopped from asserting that the Respondent is bound by that collective-bargaining agreement.

The question of the Respondent's obligations to comply with the provisions of the area collective-bargaining agreement is resolved by the provisions of the assent of participation agreement signed by the Respondent on June 30, 1975. That agreement provides that the employer, employing members of local unions, "*agrees to accept, to be bound by, and to comply with the terms and provisions of the Collective Bargaining Agreement of Local 565* stipulating these benefits." Thus, as of June 30, 1975, the Respondent undertook to be bound by the existing collective-bargaining agreement and all subsequent agreements until and unless the assent of participation agreement was terminated in accordance with its terms. The obligation entered into by the Respondent through the execution of the assent of participation agreement differs, from undertaking to become a party to the bargaining agreement by other means, in that the assent of participation agreement is subject to termination 90 days after the "Board of Trustees of the Welfare Plan shall have received from the employer *written notice* of termination of this Assent of Participation." Thus, the Respondent, by obligating itself in this manner, could by the aforedescribed 90-day notice terminate its obligation at any time, notwithstanding the provisions for termination to the contrary contained in the then current collective-bargaining agreement. Notwithstanding this "escape clause" the document clearly expresses the undertaking of the Respondent to be bound by the Carpenters collective-bargaining agreement until and unless it exercised its right to relieve itself of such obligation in the manner set forth in the agreement. From June 30, 1975, until the end of June 1982, the Respondent complied with the provisions regarding wages, fringe benefit contributions, and dues checkoff contained in each of four successive collective-bargaining agreements in effect between June 1, 1973, through May 31, 1983. During this period the Respondent, from time to time, requested the Union to provide journeyman carpenters. It also had employed union carpenters in a direct manner. In each case it paid the union wage scale to such union carpenters and fringe benefits on behalf of such union carpenters, and when a "dues checkoff" clause was provided in a subsequent contract, the Respondent complied with such provision.

An almost identical set of circumstances existed in the case of *Arco Electric Co.*, 237 NLRB 708 (1978), wherein *Arco* had signed a letter of assent which provided, inter alia, that the Respondent would be bound by the terms and conditions of employment contained in the collective-bargaining agreement then in existence. The assent

in that case also provided a termination of such assent by the giving of a 60-day notice. *Arco* failed to notify the Union of its desire to withdraw or cancel the letter of assent. The Board in that case held that the Respondent was bound by the terms of the collective-bargaining agreement superseding the then current one, until and unless termination of the letter of assent was accomplished by means of the provisions of that document itself. The identical situation exists in this case. The Respondent made the payments to the Union of the amounts stipulated in the several collective-bargaining agreements in effect during the period of June 1975 through June 1982. These payments were made for and on behalf of each employee who was a member of the carpenters union. The number fluctuated, from time to time, from as few as two such employees to as many as nine.[2]

The Respondent attempts to avoid its obligation established as set forth above by, among other things, the testimony of Keith McCollough, the president of the Company, who became affiliated with the Company in 1977. McCollough testified that the execution of the assent agreement was solely for the purpose of enabling the Respondent to lawfully make payments to the health and welfare fund on behalf of the union members it employ and for no other reason. Such effort fails. McCollough was not employed by the Company on the day it executed the assent agreement, June 1, 1975, and could hardly be expected to know the intent of the Respondent at the time the agreement was executed. The agreement executed by the Respondent is clear and unambiguous and therefore needs no collateral evidence to clarify the expressed intent. Further, the Respondent's recitation of numerous refusals on the part of the Respondent to comply with several provisions of the existing collective-bargaining agreements as evidence of the existence of an "estoppal" is not convincing. The business agent of the Union testified that on occasions he was called to observe or to rectify a violation of the agreement, such as a union carpenter performing cement finishing work. In such instances the business agent stated that "you had better do what you can do to make a living" and "You should be glad you have a job." The judgment of the Union not to enforce any specific provision in its agreement is an option available to the Union as a party to the agreement.

It is clear from the evidence in this case that: (1) the Respondent, on June 30, 1975, agreed to be bound by the collective-bargaining agreement then in effect and all successive agreements subject to a 90-day cancellation provision; (2) the Respondent by the use of the union hiring hall, the payment of health and welfare benefits, pension benefits, and apprentice benefits, and participating in a dues checkoff undertook to perform under the agreement to which it had assented, and (3) no timely notice of termination of its "Assent" was given pursuant to the provisions thereof.

[2] The Respondent's testimony establishes that it employed union carpenters or journeyman carpenters when the work required to be done was such that a qualified or experienced carpenter was required. Other work, although falling within the work description of a carpenter, was done by any employee since it did not require a high level of skill.

It is deemed insignificant that the Union persisted in efforts to obtain an "adoption" agreement from the Respondent to bind itself under the terms and provisions of the collective-bargaining agreement. The assent of participation agreement signed by the Union provided a 90-day cancellation clause. The collective-bargaining agreement provided for a specific term and did not contain an "escape clause" such as did the assent of participation agreement. Further, it is immaterial whether union personnel understood the extent of the Respondent's undertaking of June 30, 1975, when it signed the assent of participation agreement. It is understandable that the Union would desire that the Respondent directly obligate itself to the provisions of the existing collective-bargaining contract instead of the manner in which it did in light of the termination provisions of the assent of participation agreement.

Although, in view of the foregoing, it is unnecessary to determine that the Union maintain a majority of the Respondent's employees within the unit and thus was the exclusive bargaining agent for the Respondent's employees pursuant to the provisions of Section 9(a) of the Act, it is clear that such a majority did exist. In June 1982, according to the testimony of the president of the Respondent, a meeting of *all* employees was called. Those in attendance were Don Shaum (a stockholder and not a member of the unit), Juul Scholten (a union carpenter), Rick McCollough (a union carpenter), Steve Gilky (a union carpenter), Warren Lanter (a member of the operators union), Tim Forrester (an apprentice cement finisher), and Dean Layman (a member of the laborers' union). Also attending were Keith McCollough and Jack McCollough, his brother. Thus, since the above list comprised all of the employees, it is clear that the union membership among the unit (carpenters) constituted a majority of the Respondent's employees in that unit. This, coupled with the prior conduct of the Respondent in its relationships with the Union, in itself, raises the presumption that the Union was the exclusive representative of the employees in the unit for the purposes of collective bargaining.

In conformance with the foregoing, I conclude that the Respondent was subject to the terms and provisions of the collective-bargaining agreement then in effect between the Union and the General Building Contractors Council of Elkhart, Indiana, and therefore violated those provisions by its failure to negotiate with the Union on the matter of its cessation to pay the wage scale called for in the current collective-bargaining agreement, failing and refusing to continue to pay those moneys required by such contract to be paid to the health and welfare fund, pension fund, and apprentice fund and to continue to perform the "checkoff" procedures for union dues. It has thereby committed a violation of Section 8(a)(5) of the Act.

In view of this finding it follows that the Respondent is required to provide to the Union the information requested in its letter of September 24, 1982. The information requested in that letter is similar in nature to that requested in *Doubarn Sheet Metal*, 243 NLRB 821 (1979), and in *Leonard Hebert, Jr., & Co.*, 259 NLRB 881 (1981).

The information requested is necessary to the Union in conducting its procedures in respect to its representative capacity; the failure of the Respondent to provide such information is a violation of Section 8(a)(5).

CONCLUSIONS OF LAW

1. Mid-States Construction Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Brotherhood of Carpenters and Joiners of America, Local Union No. 565, affiliated with United Brotherhood of Carpenters and Joiners of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees employed by Mid-States Construction Company, performing work within the jurisdiction of, and as prescribed in, the Carpenters collective-bargaining agreement of 1982, excluding professional employees, guards and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act.

4. The Union is and has been at all times material herein the exclusive bargaining representative of all of the employees in the unit described above within the meaning of Section 9(a) of the Act.

5. At all times material herein Mid-States Construction Company has recognized the Union as the exclusive bargaining representative of its employees in the unit described above.

6. Mid-States Construction Company agreed to accept, to be bound by, and to comply with the terms and provisions of a written collective-bargaining agreement between the Union and the General Building Contractors Council of Elkhart, Indiana, effective June 1, 1982, through May 1, 1983.

7. Mid-States Construction Company violated Section 8(a)(5) of the Act about June 1, 1982, by unilaterally ceasing to pay union wage scale and certain fringe benefits, and perform a "dues checkoff" obligation for, or on behalf of, its union employees within the unit described above.

8. The aforesaid acts are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it will be recommended that it cease and desist therefrom and to take certain affirmative action as set forth below designed and necessary to effectuate the policies of the Act.

Having specifically found that the Respondent violated Section 8(a)(5) of the Act the Respondent will be directed to cease and desist from engaging in the conduct found unlawful herein and will be directed to bargain collectively and in good faith on request with the Union regarding matters within the expressed provisions of the 1982 collective-bargaining agreement. It shall further give retroactive effectiveness to the terms and conditions of employment as contained in that agreement from the day of the Respondent's unlawful conduct in June 1982 to the present date and to make whole the employees in the unit for any reduction in wages below those wage scales provided for in the collective-bargaining agreement with interest computed in the manner described in *Florida Steel Corp.*, 231 NLRB 651 (1977), and *Isis Plumbing Co.*, 138 NLRB 716 (1962). The Respondent shall also pay to the Union or the trustees of an appropriate fund those sums provided for in the 1982 Carpenters collective-bargaining agreement. Such payments are to be made to the designated health and welfare fund, pension fund, apprentice fund, administrative fund, and any other such fund not heretofore specified but provided for in the said collective-bargaining agreement. The Respondent shall also account for the Union those sums representing 2 percent of gross wages which pursuant to the terms of said collective-bargaining agreement would have been withheld and remitted to the Union for and on behalf of its employees who were or are members of the Carpenters Union.

The Respondent shall also provide within a reasonable time from the effective date of this decision answers to certain questions heretofore submitted by the Union to the Respondent in a letter dated September 24, 1982. Further, it shall be recommended that the Respondent post the attached notice.

[Recommended Order omitted from publication.]